

IN THE
SUPREME COURT OF INDIANA

No. 19A-PL-457

THE CITY OF BLOOMINGTON
BOARD OF ZONING APPEALS,
Appellant-Respondent,

v.

UJ-EIGHTY CORPORATION,
Appellee-Petitioner.

Appeal from the
Monroe Circuit Court VII,

Trial Court Cause No.
53C06-1806-PL-001240,

The Honorable Frank M. Nardi,
Judge.

APPELLANT'S PETITION FOR TRANSFER

MICHAEL ROUKER
City Attorney
Attorney No. 28422-53

LARRY D. ALLEN
Assistant City Attorney
Attorney No. 30505-53

CITY OF BLOOMINGTON
401 N. Morton Street
Bloomington, IN 47404
(812) 349-3426

Attorneys for Appellant

QUESTIONS PRESENTED ON TRANSFER

Bloomington's zoning ordinance defines fraternities and sororities as entities recognized or sanctioned by Indiana University as a matter of fact, which informs permitted uses in Bloomington's Institutional zoning district.

I. Does relying on a public university's factual recognition of a fraternity or sorority, a recognition that does not directly govern the zoning or legislative authority of the City, constitute a delegation of zoning authority?

II. Further, does requiring a public university to sanction or recognize a student fraternal group residing on campus promote the health, safety, and general welfare so as to not violate a landowner's due process protections?

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APPELLANT'S PETITION FOR TRANSFER

The utmost consideration for cities and towns across the state, and the nation, is that use-restrictions on certain properties within their boundaries promote the health, safety, and general welfare of its citizens. To accomplish these paramount goals, cities such as Bloomington often cite to appropriate, public licensing authorities for particular uses that might involve vulnerable populations, potentially dangerous uses, and threats to the general welfare of surrounding residents. This Court has acknowledged throughout its history that the State and its subdivisions can look to other sources to determine some fact upon which the law depends. *Edwards v. Hous. Auth. of City of Muncie*, 215 Ind. 330, 339, 19 N.E.2d 741, 746 (1939). In breaking with this established principle, the split panel of the Court of Appeals found that Bloomington's definition of fraternity and sorority requiring sanction or recognition of Indiana University was an unconstitutional delegation of authority. *City of Bloomington Bd. of Zoning Appeals v. UJ-Eighty Corp.*, No. 19A-PL-457, slip op. (Ind. Ct. App. Jan. 30, 2020). On the contrary, as Judge Bailey pointed out his dissent, Bloomington's definition did not violate the due process protection because Bloomington's interest in this matter bore a "rational relationship to permissible state objectives" and did not threaten to erroneously deprive landowners of their private interest. *See slip op. at 18* (Bailey, J. dissenting). In contrast, outside of the dissent, the panel failed to analyze Bloomington's ordinance under the appropriate factors found in *Matthews v. Eldridge*, 424 U.S. 319 (1976). Therefore, the City of Bloomington respectfully

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requests that this court grant transfer and reverse the Court of Appeals and trial court. Ind. Appellate Rule 57(H)(2), (6).

BACKGROUND AND PRIOR TREATMENT

This case revolves around a property located at 1640 North Jordan Avenue in Bloomington (App. p.36). This property and the properties adjacent to it are all in Bloomington's Institutional zoning district, which includes, among other uses, five residential uses: (1) Fraternity/Sorority House; (2) Group Care Home for Developmentally Disabled; (3) Group Care Home for Mentally Ill; (4) Group/Residential Care Home; and (5) University or College. Bloomington Mun. Code § 20.02.500.¹

As of February 18, 2018, the Property no longer met the Bloomington Municipal Code's definition of "Fraternity/Sorority House" as "Indiana University no longer sanctioned or recognized the Gamma-Kappa Chapter of Tau Kappa Epsilon, Inc. as a fraternity for students attending Indiana University" (App. Vol. II pp.37, 201). Bloomington defines "Fraternity/Sorority House" as:

A building or portion thereof used for sleeping accommodations, with or without accessory common rooms and cooking and eating facilities, for groups of unmarried students who meet the following requirements: all students living in the building are enrolled at the Indiana University Bloomington campus; and Indiana University has sanctioned or recognized the students living in the building as being members of a fraternity or sorority through whatever procedures Indiana University uses to render such a sanction or recognition. Shall

¹ Under Bloomington's Unified Development Ordinance, four out of the five of these residential uses require sanction/recognition or license of a public entity: fraternity/sorority; group care home for the developmentally disabled; group care home for the mentally ill; and group/residential care home. Bloomington Mun. Code § 20.11.020.

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also include a building or portion thereof in which individual rooms or apartments are leased to individuals, but occupancy is limited to members of a specific fraternity or sorority, regardless of the ownership of the building or the means by which occupancy is so limited, provided the two requirements noted in the first sentence of this definition are also met.

Bloomington Mun. Code § 20.11.020.² Residential occupancy outside of the five uses outlined above is not permitted in an Institutional zoning district. Bloomington Mun. Code § 20.02.500.

On February 20, 2018, Bloomington was informed that two individuals were occupying the Property as a dwelling (App. Vol. II p.37). Because the property could not be used as a fraternity/sorority house and because the Institutional zoning district does not permit the property to be occupied as a dwelling, Bloomington issued an NOV on February 22, 2018 (App. Vol. II p.15). UJ-Eighty appealed the NOV to the BZA (App. Vol. II pp.19-24). On May 24, 2018, the BZA denied UJ-Eighty's appeal (App. Vol. II p.61).

On June 22, 2018, UJ-Eighty petitioned for judicial review (App. pp.8-32). The trial court issued struck down Bloomington's definition of "Fraternity/Sorority House" as unconstitutional on February 6, 2018 (App. Vol. II pp.199-202). Bloomington appealed, and the Court of Appeals affirmed the trial court in a published opinion on January 30, 2020. *City of Bloomington Bd. of Zoning Appeals*

² Bloomington's City Council has passed a new Unified Development Ordinance under Ordinance 19-24, which has altered the definition of fraternity/sorority going forward. However, the new definition does not render this appeal moot because of the interests advanced and the still-pending notice of violation against the landowner under the definition that appears above.

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v. UJ-Eighty Corp., No. 19A-PL-457, slip op. (Ind. Ct. App. Jan. 30, 2020).

Bloomington petitioned for rehearing on March 3, 2020; the Court of Appeals denied rehearing on April 1, 2020, with Judge Bailey dissenting (Docket). *Order Denying Petition for Rehearing*, No. 19A-PL-457 (Ind. Ct. App. April 1, 2020).

ARGUMENT

I.

The Bloomington Municipal Code's does not delegate zoning or legislative authority to Indiana University.

The Court of Appeals incorrectly struck down Bloomington's Ordinance defining fraternity and sorority as those sanctioned or recognized by a state university as unconstitutional. *UJ-Eighty*, slip op at 16. There are two fundamental interests at play in this case: (1) a local government's ability to rely as a factual matter on the licensing of another public institution in promotion of the health and welfare of its citizens and (2) the fundamental fairness that is afforded to landowners by reliance on such institutions. As prominently noted in Judge Bailey's dissent, the Court of Appeals failed to grapple with either of these interests in its opinion. *Id.* at 17-23 (Bailey, J. dissenting).

At the outset, the Court of Appeals' opinion fundamentally misplaces the concept of delegation of authority. Bloomington's Unified Development Ordinance (UDO) defining "Fraternity/Sorority House" does not delegate any zoning or legislative authority to Indiana University. In fact, the definition is there to guide the Plan Commission and the Board of Zoning Appeals as to what factually constitutes a fraternity or sorority house. As a result, the Ordinance does not violate

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Article IV Section 1 of the Indiana Constitution.

Under Bloomington's UDO, the City's Board of Zoning Appeals is vested with the authority to determine whether someone has violated the code for improper use after a Notice of Violation has been issued. Bloomington Mun. Code § 20.09.350. While the definition of fraternity and sorority house gives guidance as to what type of organization factually qualifies under that particular use in the Institutional zoning district, it does not grant Indiana University the authority to determine the nature of uses for the property. Rather, the University is only tasked with recognizing or sanctioning student fraternal organizations. Furthermore, Bloomington is far from alone among college towns using this construction of zoning definitions.³ Indeed this recognition is vital to giving the property owner certainty

³ Iowa City, Iowa Mun. Code § 14-9A-1 "Fraternity/Sorority: A fraternal group living use used as a residence and as a center for activities and operations by a chapter of a nonprofit fraternity or sorority recognized by a 'college' or 'university;'" Madison, Wisconsin Mun. Code § 28.211 "Fraternity or Sorority House. A building used as group living quarters for students of a college, university, or seminary, who are members of a fraternity or sorority that has been officially recognized by the college, university, or seminary;" Minneapolis, Minnesota Mun. Code § 520.160 "*Fraternity or sorority*. A building which is occupied only by a group of university or college students and support staff who are associated together in a fraternity or sorority, which is officially recognized by a college or university offering an accredited course of study, and who receive from the fraternity or sorority lodging or meals on the premises for compensation;" Evanston, Illinois Mun. Code § 6-18-3 "Fraternity/Sorority: A building that is occupied only by a group of university or college students who are associated together in a fraternity/sorority that is chartered by a national or international fraternity/sorority or is officially recognized by the university or college and who receive from the fraternity/sorority lodging and/or meals on the premises for compensation;" See, e.g., Ann Arbor, Michigan Mun. Code, § 5.37.2 "Fraternity or sorority house. A Building used by a college fraternity or sorority as a principal place of residence for its members. Such house shall have an affiliation with the University of Michigan, or a postsecondary college or university that operates campus facilities in the City of Ann Arbor. Affiliation

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over what types of student organizations can take advantage of these uniquely large co-housing residences within the City. *Cf. Dvorak v. City of Bloomington*, 796 N.E.2d 236, 237–38 (Ind. 2003) (upholding Bloomington's ability to limit the number of unrelated adults in single-family residences).

The Delaware Supreme Court addressed this precise factual scenario and found that while Delaware University's decision to suspend a fraternity had collateral "zoning consequences," that decision was not transformed into an exercise of the City's legislative function. *Schweizer v. Bd. Of Adjustment of the City of Newark*, 980 A.2d 379, 383-85 (Del. 2009). As a consequence of the suspension in the Delaware case, the City of Newark's zoning ordinance required the residents vacate the property. *Id.* Just as in this case, Delaware University, a public university, exercised a quasi-judicial function when deciding to suspend a fraternity and that decision had the collateral effect of implicating Newark's zoning ordinance. *Id.* at 385, n.15 (noting that it is also within the power of the university to govern and discipline fraternities that do not comply with university regulations).

Similarly, Indiana University is a state institution that, like other state agencies, has oversight bodies designated by state statute. *See, e.g.*, Ind. Code § 21-20-2-1, *et*

shall be through the recognition of membership of the resident fraternity or sorority in associations or councils recognized by a college or university;" Albany, New York Mun. Code § 375-7(B) "FRATERNITY OR SORORITY HOUSES — A place of residence other than a hotel, rooming or boarding house or dormitory that is operated by a nationally chartered membership organization or a local chartered organization and used, occupied and maintained for persons enrolled in a college, university or other educational institution and which is recognized and subject to controls by such educational institution."

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seq. As noted by Judge Bailey in his dissent, the University must act in accordance with constitutional protections, just like any other state institution. *UJ-Eighty*, slip op. at 18. In fact, in removing its recognition of a particularly fraternity, Indiana University is merely exercising part of its inherent authority to govern affiliated student fraternal groups. *See* Ind. Code § 6-1.1-10-24 (exempting fraternities and sororities from property taxation and defining them, in part, as “a fraternity or sorority that is connected with or related to, *and under the supervision of*, a college, university, or other educational institution” (emphasis added)); 1952 Op. Atty. Gen. No. 68 (recognized that Indiana University was a “body politic” and had the right to enter into real estate purchase contracts with fraternities and sororities engaged in chapter house projects near campus “for the benefit of such institution”). The City has nothing to do with the recognition or regulation of fraternities or sororities. Instead, when establishing whether a fraternity or sorority is recognized or sanctioned by a university, the City turned to the only public university within its city limits: Indiana University. *See id.* In this way it is no different than the myriad of zoning classifications that require licensure of particular entities as part of the approval of the use. *See* Bloomington Mun. Code § 20.11.020 (defining certain uses as requiring licenses including “Day Care Centers, Child;” “Day Care Homes, Child;” group care homes; and “Outpatient Care Facilities.”).⁴ This is precisely the

⁴ “Day Care Centers, Child” must be and remain licensed by the state; “Day Care Homes, Child” must “be and remain licensed by the state and shall be operated in accordance with their license and all applicable state laws”; “Group care home for the developmentally disabled” must abide by Indiana Code 12-11-1.1 and must be a licensed facility with the state”; “Group care home for mentally ill...must be a

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type of reference to some fact upon which the law depends that this Court has found permissible. *Edwards v. Hous. Auth. of City of Muncie*, 215 Ind. 330, 339, 19 N.E.2d 741, 746 (1939).

Further, the ancillary nature of the definition and Indiana University's role in this process distinguishes this case from the bare authority relied upon by the Court of Appeals. The Court of Appeals cites to *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) and *Counciller v. City of Columbus Plan Com'n*, 42 N.E.3d 146 (Ind. Ct. App. 2015). In both *Roberge* and *Counciller* citizens were given direct veto power over a particular land use. *Roberge*, 278 U.S. at 117-18; *Counciller*, 42 N.E.3d at 150-51. Moreover, the distinction the Court used in *Roberge* was that the decision was arbitrary and unreasonable as applied to the home because it bore no relationship to the health, safety, and welfare of the surrounding area. UJ-Eighty, slip op. at 20 n.5 (Bailey, J. dissenting); see *O'Brien v. City of Saint Paul*, 285 Minn. 378, 385-86, 173 N.W.2d 462, 466-67 (1969) (citing *Leighton v. City of Minneapolis*, 16 F. Supp. 101, 105 (D. Minn. 1936) (noting that the holding in *Roberge* was that the restriction had not substantial relation to public health, safety, morals, or general welfare)). Indiana University had no such direct veto power here. Further, the sanction of on campus student groups such as fraternities and sororities is inextricably bound up with the health, safety, and

licensed facility with the state"; "Group home/residential care home" only includes those that "are licensed by the state"; and "Outpatient care facility means a facility licensed as an ambulatory outpatient surgery center by the State of Indiana, as defined by Indiana Code 16-18-2-14." Bloomington Mun. Code § 20.11.020.

public welfare of both the students and the surrounding citizens. Therefore *Roberge* simply inapplicable to Bloomington's ordinance.

II.
**Bloomington's definition of "Fraternity/Sorority House"
does not infringe on a landowner's due process rights.**

As with any other law, municipal ordinances are clothed with the presumption of constitutionality and *all doubts* must be resolved against claims of unconstitutionality when their constitutionality is challenged. *Dvorak v. City of Bloomington*, 796 N.E.2d 236, 237–38 (Ind. 2003); *Boehm v. Town of St. John*, 675 N.E.2d 318, 321 (Ind. 1996) ("If there are two reasonable interpretations of a statute, one of which is constitutional and the other not, we will choose that path which permits upholding the statute..."). In judging whether an ordinance violates due process, the Court will look to whether the ordinance bears a rational relationship to a governmental interest for substantive due process and look to the *Eldridge* factors to determine if an erroneous deprivation is likely. *See Leone v. Commissioner, Ind. Bureau of Motor Vehicles*, 933 N.E.2d 1244, 1257 (Ind. 2010); *Philly's v. Byrne*, 732 F.2d 87, 92 (7th Cir. 1984) (noting that *Eldridge* shall be used to determine what is procedurally fair and to prevent a mistaken application of law).

Bloomington's enforcement of its ordinance was not contrary to any constitutional right or a violation of substantive due process. *See UJ-Eighty, slip op.* at 18 (Bailey, J. dissenting); see Ind. Code § 36-7-4-1614(d). Substantive due process merely requires that the legislation in question bear a rational relationship to a legitimate state interest. *McIntosh v. Melroe Co., a Div. of Clark Equip. Co.*,

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729 N.E.2d 972, 976 (Ind. 2000). As Judge Bailey notes, the Court of Appeals panel neglects this standard completely. *See UJ-Eighty, slip op.* at 18 (Bailey, J. dissenting). Here, there is no question that, as a college town, Bloomington has an extraordinary interest in protecting the health, safety, and welfare of the public in regulating where certain types of uses are permitted. *See Dvorak*, 796 N.E.2d at 241 (“The legislature specifically authorized governmental units to use zoning so that ‘residential areas provide healthful surroundings for family life,’ [...] in order “to promote the public health, safety, comfort, morals, convenience and general welfare” (citations omitted)); *Bloomington Bd. of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1029 (Ind. 1998) (noting that courts have upheld a “broad range of governmental purposes and regulations,” including zoning, as legitimate state interests).

Bloomington's ordinance also did not present an erroneous deprivation of a private interest in violation of procedural due process. *See Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). The Court of Appeals' opinion did not use the tests required by the U.S. Supreme Court for procedural due process claims. The Supreme Court in *Eldridge* established the proper four-factor test for procedural due process claims: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation through the procedures used; (3) the value of any additional or substitute procedural safeguards; and (4) the government's interest, including the function involved and fiscal or administrative burdens that additional procedures would entail; *see also Philly's v. Byrne*, 732 F.2d 87, 92 (7th Cir. 1984) (noting that

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Eldridge shall be used to determine what is procedurally fair and to prevent a mistaken application of law).

Under the *Eldridge* factors, Bloomington's ordinance does violate the principles of procedural due process. As to the first factor, the nature of the interest affected is one use out of many for any property zoned institutional under Bloomington's UDO. The ordinance does not delegate authority to Indiana University over the fraternity use. Rather, it merely defines fraternity/sorority in relationship to the University. UJ-Eighty was fully aware of the recognition requirement, and if UJ-Eighty chose to continue using the property as a fraternity rather than as one of the other uses permitted in the zoning district, the occupant would always need to be a recognized fraternity—not merely a dwelling with non-sanctioned individuals (Tr. 15, 23; App. Vol. II pp. 15, 37, 201). Thus the zoning enforcement action had no impact on UJ-Eighty's private interest in the property, as that interest was clear to UJ-Eighty from the outset.

As to the second *Eldridge* factor, the procedures for review did not run the risk of an erroneous deprivation. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985). The definitional requirement that a fraternity or sorority be recognized by Indiana University by "whatever procedures" the university uses, must be read in context—particularly if the standard of review of resolving "all doubts" is given its proper weight. Bloomington Mun. Code § 20.11.020; *Dvorak*, 796 N.E.2d at 237–38. Indiana University is a public institution that was formed by an act of the Indiana General Assembly. As a result, Indiana University is bound by

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the constitutional protections of all similar public institutions. *UJ-Eighty*, slip op. at 23-24 (Bailey, J. dissenting). This is why, in this sense, requiring that fraternities and sororities be recognized by a public institution is no different than requiring other uses to be licensed by the appropriate state agencies using whatever procedures those agencies have enacted. *See* Bloomington Mun. Code § 20.11.020 (requiring “Day Care Centers, Child;” “Day Care Homes, Child;” various group care homes; and “Outpatient Care Facilities” to all have proper licensing from the state and by citation to the authorizing statutes). Just as it would be impermissible for these state agencies, which are bound to follow and uphold the Constitution, to effect an erroneous constitutional deprivation, it is also impermissible for Indiana University to do so. There is an inherent system of due process built into the powers these state entities have been afforded by the legislature. Reading Bloomington’s ordinance against this backdrop eliminates the risk of erroneous deprivation. *See Walters*, 473 U.S. at 321 (emphasizing the flexibility and deference inherent in the due process analysis).

And while this Court’s decision indicates that Bloomington could have imposed further restrictions and guidelines upon Indiana University, those additional requirements would not add value to the procedure but would come at significant procedural costs to Bloomington. The suggestion that Bloomington should have given further direction to Indiana University creates the inverse relationship of proper licensing and definitions. *See UJ-Eighty*, slip op. at 11. Here, the University, rather than the City, possesses the expertise to determine whether

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a fraternity or sorority should be recognized as a sanctioned participant in its learning community. *See id.* at 22-23 (Bailey, J. dissenting). As with the other uses requiring license cited above, public institutions with adequate knowledge of the particular use are referenced by the City for the ultimate defense of the health, safety, and general welfare of Bloomington's population who may seek out these organizations or who live near these zoned areas. As other courts have recognized, there is significant potential for dangerous situations to arise when these types of organizations go unregulated. *See McKenzie v. State of Maryland*, 131 Md. App. 124, 133 n.3, 748 A.2d 67, 70 n.3 (2000) (explaining the entrenched relationship between hazing, anti-hazing legislation and fraternities). Additionally, this protection gives clear and predictable meaning to the city's zoning ordinances. It also gives clear direction as to where the University and city can direct their enforcement of rules and laws—particularly in regard to drinking, noise, and the common issues that can and do come with these types of organizations.

However, if Bloomington were required to do the inverse and give direction to Indiana University about what is or is not a fraternity and sorority, it would come at great cost to the city. The City's Board of Zoning Appeals would not only have to do its duty to weigh the rights of the landowner, but it would also become a tribunal for the fraternal organization itself, which is not a party to the zoning use violation. Applying this type of procedure in other contexts shows the significant burden it would pose on the city and the resulting strained outcome. If applied similarly to the "outpatient care facility" use, the Board of Zoning Appeals would ultimately

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have to give direction to the State of Indiana as to what constitutes a licensed outpatient care facility and would have to review whether denial of a license for such a facility was properly adjudicated.⁵ Bloomington would be mired in layers of determinations it simply cannot make. Thus, under the *Eldridge* factors, it is clear that Bloomington's ordinance should have been found to be constitutional, as it does not violate the due process rights of the landowner.

CONCLUSION

Bloomington respectfully requests that this Court grant transfer and reverse the Court of Appeals and trial court.

Respectfully submitted,

/s/ Larry D. Allen

Larry D. Allen
Assistant City Attorney
Attorney No. 30505-53

Michael Rouker
City Attorney
Attorney No. 28422-53

CITY OF BLOOMINGTON
401 N. Morton St.
Bloomington, IN 47404
Tel. (812) 349-3426
Fax (812) 349-3441
allenl@bloomington.in.gov

Attorneys for the Appellant

⁵ Outpatient Care Facility is defined in Bloomington Mun. Code § 20.11.20 as follows: "Outpatient care facility means a facility licensed as an ambulatory outpatient surgery center by the State of Indiana, as defined by Indiana Code 16-18-2-14, that does not provide for patient stays of longer than twenty-four hours."

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WORD COUNT CERTIFICATE

I verify that this Petition contains no more than 4,200 words pursuant to Ind.
Appellate Rule 44(E).

/s/Larry D. Allen

Larry D. Allen
Assistant City Attorney
Attorney No. 30505-53

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2020, a copy of the foregoing was electronically filed using the Indiana E-Filing System (IEFS) and was electronically served upon the following person(s) via the IEFS:

D. Michael Allen
mike@lawmg.com

Garry L. Founds
gfound@lawmg.com

Kendra G. Gjerdingen
kggjerdi@lawmg.com

/s/ Larry D. Allen

Larry D. Allen,
Attorney No. 30505-53
Assistant City Attorney

CITY OF BLOOMINGTON
401 N. Morton St.
Bloomington, IN 47404
Tel. (812) 349-3426
Fax (812) 349-3441
allenl@bloomington.in.gov